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No. 91-719

In The

Supreme Court of the United States

October Term, 1991

AL C. PARKE, WARDEN

Petitioner,

v.

RICKY HAROLD RALEY

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR RESPONDENT

*J. GREGORY CLARE
(Appointed by this Court)
200 South Fifth Street
Suite 700N
Louisville, Kentucky 40202
(502) 589-5250

MARK R. BROWN
Stetson University College of Law
1401 61st Street, South
St. Petersburg, Florida 33707

**Attorney for Respondent*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment, requires that the prosecution prove the validity of a prior conviction offered for sentence enhancement by "clear and convincing evidence", when the state court's record of the prior conviction shows that the defendant was represented by counsel but is silent as to whether a *Boykin v. Alabama*, 395 U.S. 238 (1969) colloquy was given?

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The Respondent, Ricky Harold Raley, requests that the Court affirm the decision of the United States Court of Appeals for the Sixth Circuit and states as follows.

STATEMENT OF THE CASE

On May 28, 1987, Ricky Raley entered a conditional plea of guilty to second degree robbery and first degree persistent felony offender. Mr. Raley entered a conditional plea because Mr. Raley asserted that the two convictions being used to establish that he was a persistent felon were constitutionally invalid. Both of the convictions were obtained as a result of guilty pleas.

The first conviction was entered on January 3, 1980, in case No. 79-CR-1214 and imposed a sentence of five years on each count of the three count indictment. The second conviction was entered on October 8, 1981, in case No. 81-CR-0269 and imposed a five year sentence for third degree burglary and of being a second degree persistent felony offender. (AP 22-25)

Mr. Raley sought to have the convictions suppressed and filed a motion to suppress because the convictions were not knowingly and voluntarily entered (AP 39). A hearing was granted on the Motion to Suppress. At the hearing, the prosecutor filed certain copies of the judgments in the 1979 and the 1981 cases. (AP 39) The trial court then advised appellant that this caused the burden of going forward to shift to him. (AP 39) Appellant admitted that under the precedents of the Kentucky Supreme Court, the trial judge correctly stated the law. (AP 40) However, appellant advised the Court of his written motion which maintained that *under federal law* where the record is silent as to a colloquy between the defendant and the court pursuant to a guilty plea

entered, the convictions are presumed constitutionally invalid. (AP 40) In order to comply with the Kentucky law, Mr. Raley then produced evidence through his own testimony. (AP 40) The prosecution, for its part, relied on cross-examination of the appellant and on the testimony of one of the trial attorneys who had previously represented Mr. Raley.

After the State trial court denied Mr. Raley's motion to suppress, he entered a conditional guilty plea in which he reserved the right to appeal the determination of the trial court concerning the motion to suppress the PFO conviction.

Mr. Raley appealed his conviction and the Kentucky Court of Appeals affirmed Mr. Raley's conviction in a slip opinion rendered April 22, 1988. *Raley v. Commonwealth,* 87-CA-1359-MR, "Not to be Published". Relying upon *Dunn v. Commonwealth,* Ky., 703 S.W.3d 874, 876 (1985), *cert. denied* 107 S.Ct. 121, the Kentucky Court of Appeals found that the trial court properly placed the burden of production upon Mr. Raley. Relying on other cases, the Kentucky Court of Appeals concluded that the Commonwealth met its burden of proof concerning the validity of Raley's prior guilty pleas. The *Dunn* case was subsequently disapproved by the Sixth Circuit on federal habeas review, in *Dunn v. Simmons,* 877 F.2d 1275 (6th Cir. 1989), *cert. denied* 108 L.Ed.2d 778.

After the Kentucky Supreme Court denied review, Mr. Raley filed a Petition for Habeas Corpus with the United States District Court.

The United States District Court reviewed the petition and ordered the record to be supplemented with additional documentation concerning the guilty pleas of 1979 and 1981. The United States District Court, then

concluded that "the record plainly reflects that at the time of his guilty plea in late 1979, Mr. Raley was fully advised of his constitutional rights, and signed a paper admitting that he had been so advised. His understanding of those rights cannot be assumed to have evaporated in a period of less than two years between that conviction and his 1981 conviction. Furthermore, the written record plainly shows that Mr. Raley was explicitly informed of the charges against him in 1981." (AP 61)

Thereafter, Petitioner filed his notice of appeal to the United States Circuit Court of Appeals for the Sixth Circuit.

The United States Court of Appeals affirmed in part and reversed in part, and granted a conditional writ of Habeas Corpus. The State of Kentucky then filed a Petition for Certiorari with this Court.

STATEMENT OF THE FACTS

Mr. Raley stated at the suppression hearing that the two previous pleas, upon which the PFO conviction is based, were not knowingly and voluntarily entered. During the hearing on the motion to suppress the introduction of the convictions, the following evidence was submitted.

As to the 1979 conviction Mr. Raley did not recall going over any papers with Thom Marshall, his attorney at that time. He also did not recall Marshall informing him of any rights that he might be giving up. About the only thing that Marshall told him was that if he pleaded guilty he would get 5 years on each charge. (AP 43-47) With reference to the 1981 conviction, Mr. Raley stated that he had been represented by Mr. T. Clay. (AP 47) He stated he had never had any discussions with Clay before

the date on which the plea was entered in that case. (AP 48) Mr. Raley also testified that although he was only charged as a second degree persistent felony offender, Mr. Clay told him that he was charged as a *first degree* persistent felon and that the prosecutor would reduce the charge to second degree persistent felon if he would plead guilty. (AP 48-49 and AP 62).

The Commonwealth's witness, Thom Marshall, stated that he had no specific recollection of ever representing Mr. Raley. (AP 67) However, this witness stated that he did sign the form that was shown to the trial judge which certified that he as the lawyer for the defendant had advised the defendant of all of his constitutional rights. (AP 48) Mr. Marshall also testified that he honestly could not recall any of the proceedings nor could he honestly recall ever meeting Mr. Raley. (AP 67)

There was some evidence concerning sources of knowledge outside the judicial system from which Mr. Raley might have learned of his rights. Mr. Raley testified that in all of his district court cases for public intoxication, he never stood trial but instead simply pleaded guilty and paid a fine. (AP 42) No one in District Court ever asked Mr. Raley if he understood his rights. Rather, in district court they simply asked if he was intoxicated at the time of the plea. (AP 42) At the time of the first circuit court case in 1979, Mr. Raley had never been charged with a felony nor had he ever been to circuit court. (AP 43) Before the entry of the 1979 plea, Mr. Raley had never had a trial of any sort, and had never attended a trial either as a spectator or witness. (AP 43) Mr. Raley specifically testified that in 1979 he did not know he had a right to a jury trial, a right to confront and cross-examine witnesses, a right to remain silent, and a right to demand

the Commonwealth to prove its case. He further testified that he did not know these rights in 1981. (AP 51-52)

The most important piece of evidence in this case, the guilty plea sheet to which all parties and the trial court referred, was not introduced into evidence at the suppression hearing, and was not found in the record on appeal in the State proceedings.

Mr. Raley's testimony as to what he understood and wished at the time of these pleas showed only that he desired to take advantage of what he considered to be "good" deals in light of the possible sentences that could result. (AP 51) But, he did not know he had an alternative to taking the deal. (AP 57). He had no knowledge of the elements of the crime or of all of his constitutional rights.

SUMMARY OF ARGUMENTS

In *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. (1969), the Supreme Court found that the due process clause of the Fourteenth Amendment required a State trial judge to spread on the record the prerequisites of a valid waiver before a guilty plea could be accepted.

The issue here is whether the record is sufficient to show that there was a voluntary and intelligent waiver by guilty plea of the privilege against self-incrimination, the right to trial by jury, and the right to confront one's accusers. *Boykin*, 395 U.S. 243; 89 S.Ct. 1712; *United States v. Goodheim*, 651 F.2d 1294 (9th Cir. 1991).

1. The Petitioner raises for the first time in its brief with this court the argument that the Respondent is collaterally attacking his 1979 and 1981 convictions and that *Boykin v. Alabama*, as a prophylactic rule, does not apply. Petitioner did not raise this argument with the District

Court or the circuit Court of Appeals, and, therefore, it is not properly before this court.

2. The Respondent is not collaterally attacking his 1979 and 1981 convictions. He seeks no relief from the sentences imposed upon him by the courts in those two cases. He is attacking the PFO conviction that was entered in 1987.

3. When the State of Kentucky seeks to use prior guilty pleas to convict a defendant of the present crime of being a PFO, and the defendant asserts that those prior guilty pleas were not knowingly and intelligently entered into and that he was unaware of his constitutional rights at the time that he entered into those pleas, then due process dictates that the defendant has a right to be heard. Secondly, due process dictates that the burden to establish the constitutional validity of the guilty pleas is upon the State who desires to use those pleas to convict the defendant, as they are elements of a criminal offense created by the State Legislature in KRS 532.080. Thirdly, the standard of proof placed upon the state is clear and convincing. Lastly, the State may not meet its burden of proof by the use of a presumption.

The Kentucky Legislature specifically provides that only prior convictions may be used to enhance a defendant's sentence. PFO status in the State of Kentucky is a separate criminal offense. All elements of a crime must be proven beyond a reasonable doubt unless the State Legislature declares otherwise. The Legislature has not allowed the courts to use other indicators of criminal conduct to enhance a defendant's sentence. The Legislature has recognized the significance and important value of a conviction. The Legislature, like the Supreme Court in *Boykin*, supra, has recognized that a conviction is more

than an admission that an accused did various acts. By allowing only convictions to be used to enhance a sentence, the Legislature has relied upon the Judiciary to do its job to guarantee that only reliable and trustworthy facts are used to enhance a defendant's sentence. When a conviction is based upon a guilty plea that is not knowingly and intelligently entered into, it is not reliable and trustworthy. The Judiciary has a duty to the Kentucky Legislature and to its citizens under the due process clause of the United States Constitution to only use constitutionally valid convictions when enhancing a defendant's sentence.

ARGUMENTS

I

THE PETITIONER'S ARGUMENT THAT *BOYKIN* DID NOT ESTABLISH A GROUND FOR COLLATERAL ATTACK SHOULD NOT BE ADDRESSED BY THIS COURT

The Petitioner in its brief to this court asserts that *Boykin* did not establish a ground for collateral attack. The Petitioner argues for the first time that Raley is collaterally attacking the 1979 and 1981 convictions in his Petition for Writ of Habeas Corpus, and that *Boykin v. Alabama* does not apply. The Petitioner did not argue before the U.S. District Court or the U.S. Court of Appeals that *Boykin* did not establish a ground for collateral attack.

This argument appears to arise out of this Court's decision of *Stone v. Powell*, 428 U.S. 465 (1976). *Stone v. Powell*, is cited in the United States Amicus Brief to support its argument that *Boykin* creates a prophylactic rule (see dissent of Justice Harlan, *Boykin v. Alabama*, 395 U.S.

at 238, supra). Petitioner and the United States assert that the rule in *Boykin* is designed to protect constitutional guarantees and that as such it is only enforceable on direct review but not on collateral attack.

The State and the Amicus Brief of the United States characterize this as a "Burden of Proof on Habeas" case. The realty of the matter, however, is that it is not such a case at all. Instead, this is a "burden of proof in the State trial court" case. The distinction is important.

In this case, the habeas petition of Mr. Raley does not seek relief from the 1979 or 1981 convictions. Instead, he challenges the use of these convictions by the State to convict him of a new crime. Indeed, Mr. Raley would be limited in his challenge of the 1979 and 1981 convictions on Habeas review under the reasoning of *Maling v. Cook*, 109 S.Ct. 1923 (1989). The challenge of the State's use of these convictions is an entirely separate question from the issue of who has the burden of proof in federal habeas cases.

The Commonwealth of Kentucky did not previously raise the issue of Mr. Raley collaterally attacking the 1979 and 1981 convictions on habeas review and *Boykin*'s application to this collateral attack on the basis that it *may* be considered a prophylactic rule. Likewise, this issue should not be addressed by this Court.

In several of this Court's recent decisions, the Court has stated that it would not review issues that had not been addressed by the Court of Appeals. In *Hudson v. McMillian*, 112 S.Ct. 995 (1992), this Court refused to address respondent's arguments that were not addressed by the Fifth Circuit and not presented by the question on which the Court granted certiorari.

In *City of Springfield, Mass. v. Kibbe,* 107 S.Ct. 1114 (1987) the Court stated:

> "We ordinarily will not decide questions not raised or litigated in the lower court. See *California v. Taylor,* 353 U.S. 553, 556 N2 77 S.Ct. 1037, 1029, N2 1 L.Ed.2d 1034 (1957)." *Id* 1115.

In the case at hand, the Petitioner has raised an issue that was not before the Sixth Circuit and that, likewise, has not been addressed by the lower courts. This issue of whether or not *Boykin* is a prophylactic rule that does not apply in habeas petitions should not be addressed by this Court. This Court should limit its review to whether the Commonwealth of Kentucky must prove by clear and convincing evidence the validity of prior convictions that are being offered for sentence enhancement. And, whether the State may carry its burden of proof by use of a presumption.

II

THE RESPONDENT IS NOT COLLATERALLY ATTACKING HIS 1979 AND 1981 CONVICTIONS, BUT CHALLENGES THE USE OF THESE CONVICTIONS BY THE STATE TO CONVICT HIM OF A SEPARATE CRIME

As stated in the preceding argument, the Respondent herein is not seeking relief from his 1979 or 1981 convictions. The Respondent has served his time for those convictions and has not sought habeas relief in the Federal Court to be relieved from those convictions. The Commonwealth of Kentucky presents the argument that the Respondent is collaterally attacking these convictions in the habeas proceeding and that by doing so the Respondent seeks a reward or tactical advantage by waiting to

attack these convictions when they are being used in the PFO proceeding.

The Petition asserts that:

> "The Sixth Circuit's rule regarding collateral attacks on guilty pleas, exemplified by its opinion in this case, after having been reinvigorated by Dunn v. Simmons, 877 F.2d 1275 (6th Cir. 1990), cert denied, 110 S.Ct. 1539 (1990), actually rewards a criminal defendant for delaying the attack upon his guilty plea. *Instead he should wait until after he has been charged as a repeat offender (Ky. Ev. Stat. 532.080), so that he may collaterally attack his guilty plea and thereby impose on the prosecution the burden of "clear and convincing" evidence to establish the validity of his guilty plea, years after the plea was entered and even after its sentence was completely served."* (Emphasis added)

This argument is preposterous. The thought that a defendant would wait until he had served a sentence for a crime and been released from custody to attack his conviction is ludicrous. This argument loses even more credibility when it assumes a defendant would be convicted of a second crime to gain the tactical advantage of imposing upon the prosecution the burden of "clear and convincing" evidence to establish the validity of the guilty pleas to the first conviction. This argument also highlights why the case at hand is not a collateral attack on the 1979 and 1981 convictions. Mr. Raley will not receive any relief from the 1979 and 1981 convictions. If the State fails to prove by clear and convincing evidence that the guilty pleas that support the convictions are constitutionally valid, then he is relieved of the PFO convictions but not from the previous sentence he has served.

III

WHEN THE COMMONWEALTH OF KENTUCKY OFFERS A PRIOR CONVICTION AS EVIDENCE TO CONVICT A DEFENDANT OF THE PRESENT CRIME OF BEING A PERSISTENT FELONY OFFENDER UNDER KRS 532.080 AND THE RECORD OF THE PRIOR CONVICTION IS SILENT, THE COMMONWEALTH HAS THE BURDEN OF PROVING THE PRIOR CONVICTION IS CONSTITUTIONALLY VALID

The Supreme Court in *Boykin v. Alabama* established the rule that the record must show that a guilty plea was voluntarily made. The Court based its decision on the fact that several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a State criminal trial. First is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to states by reason of the Fourteenth Amendment. Second is the right to trial by jury and third is the right to confront ones accusers. The Douglas Court, in deciding *Boykin*, referenced the 1938 Supreme Court case of *Johnson v. Zerbst*, 304 U.S. 458, (1938), see *Boykin*, 395 U.S. 243 Note 5, which stated that a defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accuser. For this waiver to be valid under the Due Process Clause, it must be an intentional relinquishment or abandonment of a known right or privilege, *Johnson v. Zerbst, id* 464. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts. *Id* at 466.

The Court in *Boykin* expanded on the *Johnson v. Zerbst* decision and ruled that when a state trial judge leaves an inadequate record for any review later sought, there is reversible error. Most importantly, the Douglas Court ruled that a court cannot presume a waiver from a silent record. *Boykin*, supra, 395 U.S. at page 243.

The Petitioner has postured this case as a simple habeas action whereby a prisoner wants relief from a bad plea. But, this case is not such a case and the *Burden of Proof* issues that arise out of *Johnson v. Zerbst*, supra, do not apply. Under *Johnson*, the burden in Federal Habeas Corpus is upon the petitioner to prove to the satisfaction of the Federal Habeas Judge that he did not waive his rights. This case is concerned with the Commonwealth of Kentucky using prior convictions to convict a man of the *present* crime of being a Persistent Felony Offender (hereafter referred to as PFO).

A PFO in the State of Kentucky is a separate offense. (See KRS 532.080, Addendum to Brief of the Petitioner.) The Kentucky statute calls for the offense to be determined by a jury in a separate bifurcated proceeding immediately after a defendant has been convicted of a new felony. The Legislature drafted the statute to read as follows:

> "(1) When a defendant is found to be a persistent felony offender, the jury, in lieu of the sentence of imprisonment assessed under KRS 532.060 for the crime of which such person presently stands convicted, shall fix a sentence of imprisonment as authorized by subsection (5) or (6) of this section. When a defendant is charged with being a persistent felony offender, the determination of whether or not he is such an offender and the punishment to be imposed pursuant to subsection (5) or (6) of this section

> shall be determined in a separate proceeding from that proceeding which resulted in his last conviction. Such proceeding shall be conducted before the court sitting with the jury that found the defendant guilty of his most recent offense unless the court for good cause discharges that jury and impanels a new jury for that purpose." KRS 532.080.

The Kentucky courts have held that each element of the offense of being a PFO must be proven beyond a reasonable doubt. *Callison v. Commonwealth,* 706 S.W.2d 434 (Ky. Ct. App.1986); *Hon v. Kentucky,* 670 S.W.2d 851, 853 (Ky. 1984). (Because the Kentucky Legislature has created PFO status as a separate offense, this case is clearly distinguishable from those cases cited by the Petitioner and the United States, dealing with enhancement of sentences under the Federal Sentencing Guidelines.) Under Kentucky's PFO statute the question of whether a defendant has been convicted of a prior felony is a jury question. The factual issue of whether Mr. Raley was convicted of a prior felony is linked closely to the legal question of whether or not Raley's prior convictions are "legally valid".

But, the issue here is not the factual issue submitted to the jury of whether Mr. Raley was convicted, but the legal issue of whether the prior convictions are valid constitutionally.

When a defendant is convicted by entering a plea of guilty, the waiver of three constitutional rights takes place. See, *Griffith v. Wyrick,* 527 F.2d, 109 (8th Circuit 1975); *McCarthy v. United States,* 394 U.S. 459, 466; 89 S.Ct. 1166; 222 L.Ed.2d 418 (1969); *Boykin v. Alabama,* supra; *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). There is a strong presumption against the validity of waivers of

constitutional rights, and the acceptance of a plea of guilty must be approached with the utmost solicitude. *VonMoltke v. Gillies*, 322 U.S. 708, 723; 63 S.Ct. 316; 92 L.Ed. 309 (1948); *Knight v. State of Minnesota*, 484 F.2d 104, 106 (8th Cir. 1973). Because of this strong presumption against the waiver of constitutional rights, it is important that a court's records affirmatively show, under the totality of the circumstances, that a plea of guilty was voluntarily entered. See *Griffith v. Wyrick*, supra, 112; *Boykin*, supra. Using this well established principle that there is a strong presumption against the waiver of constitutional rights, the Supreme Court has held that to presume a waiver of the constitutional right to counsel is impermissible. See *Carnley v. Cochran*, 369 U.S. 506 (1962) and *Burgett v. Texas*, 389 U.S. 109 (1967).

In *Burgett*, supra, the petitioner was charged in a five count indictment and convicted of assault with malice aforethought with intent to murder; repetition of offense. The first count charged assault. The other counts, pursuant to the Texas recidivist statutes, alleged prior felony convictions. The petitioner objected to the prosecution offering into evidence two differing certified copies of Tennessee convictions and a certified copy of the indictment in the prior Texas prosecution. The petitioner objected to the first and second version of the Tennessee judgments because he was not represented by counsel. His objection was upheld as to the first version of the Tennessee judgment, but it was overruled as to the second version which stated petitioner had "appeared in proper person" but did not add (as did the first version) "without counsel". The Supreme Court reviewed the state proceedings and found that the convictions were "presumptively void", because the record was silent as to

whether or not the petitioner had waived his Sixth Amendment right to counsel. The Court recognized that the states are free to create rules of evidence and of procedure as they choose, but none of these evidentiary or procedural rules may infringe upon a guaranteed Federal Constitutional right. The Court stated:

> "The recent right to counsel cases, starting with *Gideon v. Wainwright*, 372 U.S. 335, are illustrative of the limitations which the Constitution places on state criminal procedures." *Burgett*, supra, at 389 U.S. 114. (Emphasis added)

Likewise here, Mr. Raley's 1979 and 1981 convictions are presumptively void because the records of each conviction are silent and each conviction is based upon a guilty plea which by its very nature entails the waiver of three constitutional rights.

Using the two prior convictions here to find Mr. Raley guilty of PFO status would not only violate this Court's decision in *Burgett* and *Boykin*, but would most importantly violate due process because it would allow the state to use unreliable and untrustworthy evidence to convict a person charged with a crime. It is, thus, submitted that the Sixth Circuit is correct in its finding that *Boykin*, places the burden on the Commonwealth to prove the constitutional validity of the prior pleas where the record is silent. This conclusion is correct because, as in *Burgett*, a constitutionally protected right is in question. In *Burgett*, it was the defendant's right to counsel, and in *Boykin* it was defendant's knowing and intelligent waiver of his right to a jury trial, to confront his accusers, and to remain silent. Similarly here, Mr. Raley alleges that he did not knowingly and intelligently waive his right to confront his accusers, to remain silent, and to a jury trial.

On similar grounds, this Court has held that before a state may use a defendant's confession as evidence in a trial, that state must hold a hearing to decide whether the defendant's confession was voluntary and reliable. See *Jackson v. Denno*, 378 U.S. 368 (1964). Mr. Raley is entitled to a similar hearing where greater rights are at stake than are involved with an involuntary confession being used as evidence in the trial. In *Loper v. Beto*, 405 U.S. 364; 92 S.Ct. 1014; 31 L.Ed.2d 374 (1972), the Court in deciding that case recognized that the use of invalid prior convictions as evidence for purposes of impeachment only goes to credibility and is not so serious as the use of a conviction for enhancement which may add years of imprisonment to the sentence of a defendant. *Loper*, 405 U.S. at page 1017. Likewise here, due process would require that Mr. Raley should be given the same protection that *Jackson v. Donna*, supra, creates for the use of confessions in a trial.

Jackson v. Denno, is important to review because it is procedurally very similar to the case at hand. In *Jackson* the defendant was denied a proper hearing by the Trial Court in regard to the constitutional validity of his confession. After exhausting his state remedies, the defendant petitioned for federal habeas review. The habeas petition was denied by the District Court and the Circuit Court. But, the Supreme Court accepted the case and reversed. The Supreme Court held that the State Court should have held a hearing before admitting the confession and remanded the case to the District Court with instructions to send the case back to the State Court for a proper hearing. *Jackson v. Denno*, supra, 378 U.S. at 396. Likewise here, the relief Mr. Raley seeks is the holding of a proper hearing in the State Court according to federal

law. The Sixth Circuit procedurally was correct in sending this matter back to the State Court for a new hearing according to federal law. The Court of Appeals did not order the Federal District Court to hold a hearing to decide whether the plea was voluntary. If it did, then and only then would the issue be "the proper burden on habeas corpus." This matter should be sent back to hold a proper hearing in the State Court and the Court should be directed to presume that Mr. Raley's prior guilty pleas are constitutionally invalid because of the silent record, and that the burden should be placed upon the State to prove the constitutional validity of the pleas.

This Court has held innumerable times that the burden of proving the waiver of a constitutional right is always on the State. See *Bumper v. North Carolina*, 391 U.S. 436 (1966) (burden of state to establish waiver (consent) of Fourth Amendment rights); *Miranda v. Arizona*, 384 U.S. 436 (1966) (burden on state to show waiver of privilege against self-incrimination and counsel); *United States v. Wade*, 388 U.S. 218 (1967) (burden on state to show waiver of counsel at line-up). And, of course, with trial rights the burden is even heavier. See *Patton v. United States*, 218 U.S. 276 (1930) (waiver of jury trial); *Faretta v. California*, 422 U.S. 806 (1975) (waiver of trial counsel); *Boykin*.

The Commonwealth of Kentucky and the United States Amicus Brief discuss the traditional principal of finality of judgments and the presumption of regularity. Their briefs argue that the Sixth Circuit's decision is contrary to the principle of finality of judgments and the "presumption of regularity". This contention is distracting from the issue at hand and is inaccurate. The Sixth

Circuit did not fail to consider the "presumption of regularity" and the "principal of finality" as its decision was based upon *Boykin*, supra, which is based upon *Johnson v. Zerbst*, supra, which is the same case cited by both the United States and the Petitioner as the basis for these two arguments. The due process problems of presuming a waiver of constitutional rights from a silent record far outweigh the principle of "finality of judgment" and the "presumption of regularity", as these principles are not based upon constitutional rights.

IV

THE PETITIONERS RELIANCE ON *LOPER V. BETO*, 405 U.S. 364 FOR THE PROPOSITION THAT THE DEFENDANT SHOULD HAVE THE BURDEN OF PROOF IS MISPLACED

The Petitioner and the United States argue that because prior convictions offered for enhancement purposes will in many instances be from another era; from other states; and the remoteness of prior convictions may present insuperable obstacles to the prosecution successfully defending even non-meritorious collateral attacks, that, therefore, the burden of proving the invalidity of prior convictions must be on the defendant. As a basis for this argument both the Petitioner and the United States cite the dissents in *Loper v. Beto*, supra. *Loper* was correctly decided by the majority, but its practical effect was a difficult conclusion and, thus, the dissenting opinions were strong.

Mr. Loper was tried and convicted of rape in 1947. During the trial in 1947, the prosecution introduced prior convictions to impeach Mr. Loper's credibility. The four prior felony convictions took place in 1931-1940. Twenty-

two years after Mr. Loper was convicted he filed a habeas petition in Federal Court alleging that the previous conviction was constitutionally invalid under *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963), because he had been denied the assistance of counsel when convicted of the prior felonies between 1931-1940. The majority led by Mr. Justice Stewart agreed with Mr. Loper and set aside the judgment and remanded the case to the Court of Appeals for further proceedings. Mr. Justice White concurred in the result, but would have preferred to have found that the introduction of the convictions into evidence was harmless error.

Chief Justice Burger, Justice Powell, Justice Blackmun, and Justice Rehnquist dissented. Their dissents are primarily based upon the practicality of the case and not, apparently, with the rules of law established by *Gideon* and *Burgett*. Chief Justice Burger and Justice Powell stated, "When we held that *Gideon* is retroactive we meant that *Gideon* applies to an uncounseled felony conviction obtained in the past and renders that conviction invalid for *future purposes*." (Emphasis ours) See *Loper v. Beto*, 405 U.S. at 1023. Justices Powell and Burger objected to the broad enlargement effect the plurality gave to the doctrine of retroactivity, but did not wish to overrule *Gideon* or *Burgett*. Justice Rehnquist dissents also, but he concluded that the necessary predicate for the plurality constitutional decision was absent. See *Loper*, supra, 405 U.S. at 1029. Justice Rehnquist does not retreat from the decision of *Gideon* or *Burgett*, and upholds the concept that when there is a silent record there is a presumption against waiver of a fundamental constitutional right. Justice Rehnquist references *Carnley v. Cochran*, 369 U.S. 506, 82 S.Ct. 804, 8 L.Ed. 2d 70 (1962).

The Petitioner's reliance on *Loper* for the proposition of placing the burden of proof on the defendant to prove the constitutional invalidity of prior conviction, is misplaced. *Loper* is specific to its unusual facts, and is a unique holding that should not be referenced to detract from the important decisions of *Gideon, Burgett,* and *Boykin.* In the case at hand, Mr. Raley contests the use of constitutionally invalid felony convictions obtained in the past that are now being used in the present to enhance his sentence. Justice Burger's and Justice Powell's dissent in Loper indicate that they believe that this was how *Gideon v. Wainwright,* supra, should be applied. It is submitted that the intent of *Gideon v. Wainwright* should be applied here.

This is the situation at hand with Mr. Raley. The State desires to use the constitutionally invalid conviction to establish an element of a present crime. The argument that because the State may have difficulty in proving the constitutional validity of a prior conviction is not a basis to erode the principles of *Boykin* and place the burden of proof on the defendant. The reverse of the Petitioner's argument is, in fact, the reason *Boykin* should be found to dictate that the State has the burden of proof in this case.

If the State has difficulty in proving the constitutional validity of prior crimes because of the passage of time, clerical errors, the unavailability of records, the inaccessibility of witnesses, or any of the other multitude of problems the State alleges they have in establishing the validity of convictions, then how can a defendant with considerably less resources and control over records be required to prove the invalidity of a conviction when the State's record is silent? Due process cannot mean that when a legislature includes as an element of a crime a

legal fact (i.e., the existence of a conviction) that the defendant shall be required to prove one iota of the case against himself. The State is given a definite advantage over the defendant and the presumption of regularity in State Judicial proceedings should not override the strong presumption against assuming a waiver of constitutionally protected rights.

This case is limited to the burden of proof of the Commonwealth of Kentucky when proving prior convictions to obtain a conviction under the Kentucky PFO statute. This fact is important because due process is violated when a presumption operates to shift to the defendant the burden of disproving an element of a defined crime. *Sandstrom v. Montana*, 442 U.S. 510 (1979); *In re Winship*, 397 U.S. 358 (1970). Although a state may avoid the structure of *Winship* it may only do so by formally redefining the crime. Hence, in *Patterson v. New York*, 432 U.S. 197 (1977), the Court found that the state may require the defendant to prove an affirmative defense, but only where the defense did not constitute an element of the crime. Similarly, the state may constitutionally place a less burden on the prosecution to prove the existence of facts relevant to sentencing. See *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). However, again form is crucial. Where the relevant facts are elements of the crime, they must be proved beyond a reasonable doubt.

V

THE STANDARD OF PROOF PLACED UPON THE GOVERNMENT SHOULD BE CLEAR AND CONVINCING

If you start with the principle that a defendant who enters a guilty plea is waiving three constitutional rights

and marry that with the principle that the waiver of these constitutional rights is presumptively invalid, it follows that the State must prove the validity of the guilty plea by a high standard of proof that reflects our society's confidence, and reliability in the correctness of convictions.

In *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979), the Court by unanimous vote declared:

> "The function of a standard of proof, as that concept is embodied in the due process clause and in the realm of fact finding, is to instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *Addington, Id.* at 423, 99 S.Ct. 1808, quoting *In re Winship*, 397 U.S. 358, 370, 90 S.Ct. 1068, 1075, 25 L.Ed.2d 368 (1970).

Addington was quoted with approval by the Supreme Court in *Santosky v. Kramer*, 102 S.Ct. 1388, 455 U.S. 743, 71 L.Ed.2d 599 (1981). *Santosky v. Kramer* provides a thorough and clear review of the purpose behind the judiciary allocating different standards of proof to various proceedings and the factors to consider in assigning a standard of proof. The Court in Santosky states that, "*Addington* teaches that, in any given proceeding, the *minimum* standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interest affected, but also societal judgment about how risk of error should be distributed between the litigants." *Santosky v. Kramer*, 455 U.S. 754-755. The Court in *Santosky* outlined the following examples of three common standards of proof: (1) preponderance of evidence; (2) clear and convincing; and (3) beyond a reasonable

doubt. Below are excerpts from *Santosky* discussing each of these burdens of proof.

Preponderance of Evidence

"Thus, while private parties may be interested intensely in a civil dispute over money damages, application of a "fair preponderance of the evidence" standard indicates both society's "minimal concern with the outcome," and a conclusion that the litigants should "share the risk of error in roughly equal fashion." *Santosky*, 102 S.Ct. 1395.

Beyond a Reasonable Doubt

"When the State brings a criminal action to deny a defendant liberty or life, however, "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." *Ibid.* The stringency of the "beyond a reasonable doubt" standard bespeaks the "weight and gravity" of the private interest affected, *id.*, at 427, 99 S.Ct., at 1810, society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself." *Id.* at 424, 99 S.Ct., at 1808. See also In re Winship, 397 U.S., at 372, 90 S.Ct., at 1076 (Harlan, J., concurring)." *Santosky*, 102 S.Ct., 1395-96.

Clear and Convincing

"This Court has mandated an intermediate standard of proof – "clear and convincing evidence"

– when the individual interests at stake in a state proceeding are both "particularly important" and "more substantial than mere loss of money." *Addington v. Texas*, 441 U.S., at 424, 99 S.Ct., at 1808. Notwithstanding "the state's 'civil labels and good intentions,' " *id.*, at 427, 99 S.Ct. at 1810, quoting *In re Winship*, 397 U.S., at 365-366, 90 S.Ct., at 1073-1074, the Court has deemed this level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with "a significant deprivation of liberty" or "stigma." 441 U.S., at 425, 426, 99 S.Ct., at 1808, 1809. See, e.g., *Addington v. Texas, supra*, (civil commitment); *Woodby v. INS*, 385 U.S., at 285, 87 S.Ct., at 487 (deportation); *Chaunt v. United States*, 364 U.S. 350, 353, 81 S.Ct. 147, 149, 5 L. Ed. 2d 120 (1960) (denaturalization); *Schneiderman v. United States*, 320 U.S. 118, 125, 159, 63 S.Ct. 1333, 1336, 1353, 87 L.Ed. 1796 (1943) (denaturalization)." *Santosky v. Kramer*, 102 S.Ct. 1396.

It is submitted that in light of the individual interests that are at stake in placing a defendant behind bars and the severe deprivation the defendant will suffer by having his sentence enhanced versus the State's interest in expeditious proceedings, that the defendant is entitled to at least an intermediate standard of proof.

The Court in *Santosky* reviewed the issue before it. "The correct standard of proof in a parental right termination," according to the principles set down in *Matthews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). The same review is applicable here. The first factor under *Eldridge* is the private interest affected. Here the private interest affect is a severe and substantial loss of liberty.

This factor weighs heavily against use of the "preponderance" standard. The second factor under *Eldridge* to be considered, is the risk of erroneous deprivation of private interest resulting from use of a "fair preponderance" standard and the likelihood that a higher evidentiary standard would reduce that risk. See *Santosky*, 424 U.S. at 335. Because convicted felons as a group are often poor, uneducated, illiterate, unsophisticated, ignorant of the constitutional protections granted to them, and unfamiliar with complicated issues of criminal law, degrees of guilt and innocence and elements of crimes, guilty pleas by their very nature are subject to error and infirmities. Thus, *Boykin* was decided.

In conjunction with the fact that defendants as a group are at a disadvantage as stated above, the State's ability to assemble its case inevitably dwarfs the defendant's ability to mount a defense. (The State's failure to adequately preserve its own records is also the only reason why this Court must determine the issues before it today.) The State's attorney will most always be experienced in gathering his records, building his case, and the procedures followed at the hearing. Furthermore, the primary evidence at the hearing will be the State's own records. Couple this with the "fair preponderance of the evidence" standard and these factors create a significant prospect of erroneous guilty pleas. See *Santosky*, 102 S.Ct. 1400.

Most importantly, given the weight of the private interest at stake, the social costs of even occasional errors are sizeable. Illustrative of the significant social cost that directly follow the loss of faith in our judicial system is had by reviewing the backlash of the verdict in the recent "*Rodney King*" trial in the bell-weather state of California.

The public's perception of the inequities and unreliability of our judicial system costs many of our citizens their lives, hundreds of millions of dollars in property damage, and an immeasurable amount of lost hope and frustration among those members of our society most directly affected by our criminal justice system, (i.e., the poor, uneducated, illiterate members of minorities living in our urban cities).

Imposing an intermediate standard of proof would have both a practical and symbolic consequence. *Addington v. Texas*, 441 U.S. at 425, 99 S.Ct. at 1809; *Santosky v. Kramer*, 102 S.Ct. 1400, 455 U.S. 763. Dictating an intermediate standard of proof is one way to impress upon the fact-finder the importance of the decision he is making.

But, before a decision regarding standard of proof is made, the State's interest must then be considered. *Eldridge*, supra. The State's interest must be properly weighed against the individual's interest. The State's interest in this regard is to protect its fiscal and administrative costs, to preserve the concept of finality of convictions, and to uphold the presumption of regularity in court proceedings. All of these interests are important and valid interests that allow our judicial systems to function at a time when they are overworked, underfunded. But, in an age of technology and computerization, where even the poorest of our society have "VCR's" and "Walkmans" the State can easily afford the cost of recording and preserving a plea. Furthermore, the cost and expense of recording and preserving a plea is minuscule compared to the cost of housing one erroneously convicted felon for 5 to 15 years, let alone the cost associated with loss of faith in our judicial system by

society. The concepts of finality and regularity are also not significantly eroded if a state properly preserves its records and follows the simple and straight forward rules of *Boykin* that justify a presumption of regularity and the concept of finality. Without adhering to these simple procedural tasks the State is not entitled to a presumption of regularity of its proceedings and/or to the principle of finality.

An example of the ease and fiscal reasonableness of following the Supreme Court's decision in *Boykin* may be had by a look at the actions of the District Courts in Jefferson County, Kentucky. The District Court in Jefferson County uses a simple "Boykin Sheet" in every DUI case where a guilty plea is entered, see Addendum. This "Boykin Sheet" is reviewed on the record by the Court, signed by the Judge, the defendant, and defense counsel. The sheet is then placed in the case jacket for preservation. An audio recording is also made and the Court Administrator is responsible for the storage and preservation of these audio tapes. The tapes are then stored by date. These simple procedures ensure that all defendants who plead guilty to DUI in Jefferson District Court have their pleas properly taken according to *Boykin* and that their pleas are preserved. The cost of these functions are not taxing fiscally or administratively.

It is submitted that weighing the different competing interests of the State and the individual as set forth in *Eldridge* and examining the constitutional rights that are at stake by presuming a waiver where the record is silent, that the standard of proof should be "clear and convincing."

VI

THE STATE SHOULD NOT BE ALLOWED TO MEET ITS BURDEN OF PROOF BY THE USE OF A PRESUMPTION

The Sixth Circuit decision in *Dunn v. Simmons*, 877 F.2d 1275 at 1278 (6th Circuit 1989), succinctly sets forth why the use of a "presumption of regularity" circumvents the ruling in *Boykin* by ostensibly only using the presumption to satisfy a burden of production. Under the procedure proposed by the Commonwealth, the State retains the burden of persuasion on the ultimate question of intelligent and voluntary waiver. But, once the state establishes the plain record of conviction, the burden of producing evidence shifts to the defendant to show an irregularity in the plea procedure since that unadorned record, bolstered by the presumption, is held by the State to be sufficient to establish a *prima facie* case that the guilty plea was validly accepted. The defendant is permitted to "refute" this presumption, presumably by evidence that would be sufficient to support a finding that the plea proceedings were inadequate.

Although the State's procedure ostensibly permits the use of the presumption only to satisfy a burden of production, in reality it may be utilized by the State to carry its ultimate burden of persuasion. That is because, if the defendant offers no rebuttal, the State will prevail; the presumption becomes a substitute for evidence supplementing the conviction record. The practical effect of the State's procedure, then, is to allow the State to prevail by carrying its burden of persuasion upon the bare record of the fact that a conviction was entered against the defendant. This result ignores the Supreme Court's

admonition in *Boykin* against presuming a waiver from a silent record.

The review of this issue by the Sixth Circuit in *Dunn*, supra, is the only logical conclusion that can be reached and should be accepted by this Court.

VII

THE STATE IS WRONG TO *PRESUME* THAT RALEY WAS AWARE OF HIS RIGHTS IN THE 1981 PROCEEDING BECAUSE OF HIS EXPERIENCE WITH THE COURTS IN 1979

"Presuming" a basic understanding of trial rights from the defendant's single, prior experience with the law is dubious at best. Also, as a factual matter, such a presumption is unsound. Psychologists generally recognize that long term memory (defined as memory removed from an event by more than a few seconds) is fleeting and indefinite. Stephen K. Reed, *Cognition*, Anderson Publishing (2d ed. 1988) at page 82, and see generally, John Best, *Cognitive Psychology*, St. Paul, Minnesota (1986). Certain events, like the death of a loved one or the death of a President, will be indelibly etched on one's memory for a lifetime. More often, however, memory of events fade and become only vague recollections. Common to most law students, for example, is the experience of studying material for hours and hours before an exam, only to lose command of the specific subject within a few weeks (or even days).

Prior experience with the legal system, of course, might have evidentiary value, and might even allow one to draw an inference that the defendant understood his rights. Such an inference, however, must be cast as only a permissive one, see *County Court of Ulster County v. Allen*,

442 U.S. 140 (1979), and cannot be made controlling. In any event, given the lack of expert evidence dealing with long term memory, the Court should not now attempt to forge a presumption that a person once exposed to the legal system forever remembers his rights. It is not probable that such is the case, and indeed, appears very improbable. The issue should be left to the lower courts in the first instance to decide whether as an evidentiary matter such an inference is persuasive.

CONCLUSION

The Sixth Circuit's opinion should be affirmed.

Respectfully submitted,

/s/ J. Gregory Clare
*J. Gregory Clare
(Appointed by this Court)
Mulloy, Walz, Wetterer,
Fore & Schwartz
First Trust Centre, Suite 700N
200 South 5th Street
Louisville, Kentucky 40202
(502) 589-5250

Mark R. Brown
Stetson University
College of Law
1401 61st Street, South
St. Petersburg, Florida 33707

Attorney for Respondent

AOC-056-25
4-88

No._____

JEFFERSON DISTRICT COURT

COMMONWEALTH OF KENTUCKY

PLAINTIFF

VS.

GUILTY PLEA

_____

DEFENDANT

* * * * * * * * * * * * * * * * *

1. Do you understand the charges against you and wish to plead guilty?
   _____YES _____NO
2. Do you know that you have the right to jury trial and if you plead guilty you give up that right?
   _____YES _____NO
3. Do you know that you have the right to remain silent and not plead guilty but if you do plead guilty you give up these rights?
   _____YES _____NO
4. Do you know you have the right to question witnesses against you and call witnesses on your behalf?
   _____YES _____NO
5. Are you under the influence of any alcohol, drugs or narcotics?
   _____YES _____NO
6. Have you been or are now being treated for a mental illness?
   _____YES _____NO
7. Has anyone threatened or coerced you to plead guilty or promised you anything to make you plead guilty?
   _____YES _____NO
8. Are you pleading guilty voluntarily and of your own free will?
   _____YES _____NO
9. Are you admitting to this Court that you drove while under the influence of alcohol?
   _____YES _____NO

* * * * * * * * * * * * * * * * *

10. Do you know you have the right to counsel and are you freely waiving that right?
    _____YES _____NO
11. Do you understand that you must attend and complete an Alcohol Education Program?
    _____YES _____NO

_____ Defendant

_____ Attorney for Defendant

_____ Judge

Date_____

APPENDIX